

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

FELICIA M. CAVANAGH,

Plaintiff,

v.

NEVADA STATE MILITIA,

Defendant.

Case No. 3:24-cv-00196-ART-CSD

ORDER

(ECF No. 20)

Plaintiff Felicia Cavanagh filed suit under the Freedom of Information Act (FOIA) against Defendant Nevada National Guard for failing to provide her with documents she requested from the agency. (ECF No. 1.) The agency moved to dismiss Cavanagh's complaint for failing to exhaust administrative remedies. (ECF No. 20.) The Court agrees but declines to dismiss the complaint. Instead, the Court stays the case while Cavanagh appeals or refiles her FOIA request.

**I. Factual and Procedural Background**

In March 2023, Plaintiff Felicia Cavanagh's daughter Allison Bailey died after being other-than-honorably discharged from Defendant Nevada National Guard ("NNG"). Days after Bailey's death, Cavanagh requested all of Bailey's records from NNG, and NNG provided Bailey's service records. (ECF No. 1 at 6.) Cavanagh alleges that the records provided did not include Bailey's "med-board" or documents related to her Article 15 proceedings.<sup>1</sup> (*Id.*)

Cavanagh requested records related to Bailey's Article 15 proceedings and medical board from NNG. (ECF No. 1 at 6.) NNG has not yet provided these

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<sup>1</sup> Article 15 proceedings are nonjudicial disciplinary proceedings. *Turner v. Dep't of Navy*, 325 F.3d 310, 312 (D.C. Cir. 2003). A medical board ("med-board") is an evaluation through which officials determine if a servicemember is subject to a medical discharge. *See Meyer v. United States*, 127 Fed. Cl. 372, 374 (2016).

1 documents to Cavanagh. Because Cavanagh’s ability to sue in this Court depends  
2 on timing, the Court recites the relevant timeline from the Complaint and  
3 attached exhibits.

4 On May 4, 2023, Cavanagh requested these records from the NNG Records  
5 Department. (ECF No. 1 at 10.) NNG acknowledged receipt eleven days later. (*Id.*  
6 at 12.)

7 On May 31, 2023, Cavanagh filed two more FOIA requests for emails  
8 relating to Bailey in email accounts for three NNG officials between 2020 and  
9 2023 and records from Bailey’s medical boards. (*Id.* at 17–23.) These requests  
10 were received by NNG around one week later and assigned case numbers. (*Id.* at  
11 17.) Over the next several months, Cavanagh sought updates on her requests.  
12 (*Id.* at 27, 30, 32.) NNG representatives responded that responsive records had  
13 been located, and they were being reviewed by the legal department. (*Id.* at 28,  
14 30, 32.)

15 In February 2024, NNG formally declined Cavanagh’s requests. To  
16 Cavanagh’s request for medical records and Bailey’s Article 15 proceedings, NNG  
17 said that it had already provided “a complete copy of Allison Bailey’s service  
18 records.” (*Id.* at 35.) To Cavanagh’s request for emails mentioning Bailey, the NNG  
19 said that it “failed to locate any documents that would be responsive.” (*Id.* at 37.)  
20 Both responses explained how to administratively appeal the decision to NNG’s  
21 Adjutant General. (*Id.* at 35, 37.) Cavanagh acknowledges that she understood  
22 she could appeal the NNG’s responses. (*Id.* at 8.) Instead, three months later,  
23 Cavanagh filed suit in this Court to admonish the NNG for declining to comply  
24 with her records requests.

25 In response to the briefing in this case, Cavanagh filed an addendum in  
26 which she alleges additional, relevant facts. She alleges that Adjutant General  
27 Waters met with Nevada State Senators to show them documents related to  
28 Allison Bailey’s Article 15 proceedings. (ECF No. 26 at 1.) She alleges that Waters

1 did so to discourage them from supporting legislation promoted by Cavanagh  
 2 related to NNG disciplinary proceedings. (*Id.*) Cavanagh also alleges that she  
 3 never received these documents. (*Id.* at 2.) Further, Cavanagh alleges that NNG  
 4 Captain Marcus showed a transcript of Allison Bailey’s “Separation Board” to a  
 5 reporter from the *Reno Gazette Journal*, which Cavanagh also allegedly had never  
 6 received. (*Id.* at 2.)

## 7 **II. Standard of Review**

8 When deciding a motion to dismiss a complaint, courts “accept as true all  
 9 well-pleaded allegations and construe them in the light most favorable to the non-  
 10 moving party.” *Hampton v. Cal.*, 83 F.4th 754, 761 (9th Cir. 2023) (cleaned up).  
 11 “A claim has facial plausibility when the plaintiff pleads factual content that  
 12 allows the court to draw the reasonable inference that the defendant is liable for  
 13 the misconduct alleged.” *O’Brien v. Welty*, 818 F.3d 920, 933 (9th Cir. 2016)  
 14 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) and *Ashcroft v.*  
 15 *Iqbal*, 556 U.S. 662, 678 (2009)). *Pro se* filings are “to be liberally construed, and  
 16 a *pro se* complaint, however inartfully pleaded, must be held to less stringent  
 17 standards than formal pleadings drafted by lawyers.” *Erickson v. Pardus*, 551  
 18 U.S. 89, 94 (2007) (cleaned up, internal quotation marks omitted).

19 FOIA reflects Congress’s recognition that “government transparency is  
 20 critical to a functioning democracy.” *Yagman v. Pompeo*, 868 F.3d 1075, 1078–  
 21 79 (9th Cir. 2017) (citing *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151–  
 22 52 (1989)) (cleaned up). FOIA requires administrative exhaustion, though it is “a  
 23 prudential rather than jurisdictional consideration,” and a court may waive that  
 24 requirement, if, for example, the court finds that exhaustion would be futile.”  
 25 *Aguirre v. NRC*, 11 F.4th 719, 725 (9th Cir. 2021) (citing *Yagman*, 868 F.3d at  
 26 1083–84).

## 27 **III. Analysis**

28 NNG argues that Cavanagh has failed to exhaust her administrative

1 remedies by not appealing its denial of her FOIA request, and that the futility  
2 exception does not apply. Cavanagh argues that the exception applies.

3 **A. Exhaustion Requirement**

4 NNG argues that Cavanagh has failed to meet FOIA's exhaustion  
5 requirement.

6 FOIA requires federal agencies, including state components of the National  
7 Guard, to disclose information to the public upon request. *See In re Sealed Case*,  
8 551 F.3d 1047, 1049 (D.C. Cir. 2009). After receiving a FOIA request, an agency  
9 "has twenty working days to decide whether to comply and inform the requester  
10 of its decision." *Aguirre*, 11 F.4th at 725 (citing 5 U.S.C. § 552(a)(6)(A)(i)). Final  
11 responses under FOIA must include "the agency's determination of whether or  
12 not to comply with the request; the reasons for its decision; and notice of the right  
13 of the requester to appeal to the head of the agency if the initial agency decision  
14 is adverse." *Corbett v. TSA*, 116 F.4th 1024, 1028–29 (9th Cir. 2024) (internal  
15 citations omitted).

16 There are two avenues to judicial review of a FOIA request. First, if the  
17 agency fails to respond to a request within twenty days, the requester may sue in  
18 federal court before a decision. 5 U.S.C. § 552(a)(6)(C)(i). Second, if the requester  
19 is dissatisfied with the agency's response, she may sue the agency in federal court  
20 after exhausting "available administrative remedies, including an appeal within  
21 the agency." *Id.* (citing 5 U.S.C. § 552(a)(6)(A)(i)–(ii), (C)(i)).

22 In the Ninth Circuit, "if an agency responds after the twenty-day statutory  
23 deadline and before the requester files a complaint in federal court, the requester  
24 'in essence waives [the] right to immediately sue.'" *Corbett*, 116 F.4th at 1028  
25 (citing *Aguirre*, 11 F.4th at 725). In such cases, the requester must appeal the  
26 denial unless an exception applies, for instance, if exhaustion would be futile. *Id.*  
27 (citing *Aguirre*, 11 F.4th at 725; *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57,  
28 63–64 (D.C. Cir. 1990).

1 NNG's final response included its decision not to comply with the request,  
2 its reasons for its decision, and notice of Cavanagh's right to appeal. Although  
3 NNG took longer than twenty days to respond to Cavanagh's requests, Cavanagh  
4 did not file this lawsuit until three months after NNG's final response.  
5 Accordingly, under *Corbett*, Cavanagh waived the right to immediately sue unless  
6 an exception to the exhaustion requirement applies. *See* 116 F.4th at 1028.

7 **B. Futility Exception to Exhaustion Requirement**

8 Cavanagh argues that appealing NNG's response to the agency would be  
9 futile. NNG responds that Cavanagh has not alleged facts showing that  
10 exhaustion would be futile.

11 Cavanagh's allegations do not show that it would be futile to appeal. From  
12 a FOIA plaintiff's point of view, "it may indeed appear futile to . . . exhaust their  
13 administrative remedies," but requiring exhaustion also gives the agency a  
14 chance to develop a better record, as well as "to exercise its discretion and  
15 expertise." *See In re Steele*, 799 F.2d 461, 466 (9th Cir. 1986) (denying futility  
16 argument in failing to exhaust FOIA remedies). If Cavanagh had appealed NNG's  
17 rejections, the Court would have a clearer record from which to glean the agency's  
18 rationale. Accepting as true Cavanagh's allegations that the Adjutant General  
19 and another official possessed documents that Cavanagh had not received, it  
20 does not follow that an adverse decision was certain. *Agua Caliente Tribe of*  
21 *Cupeño Indians of Pala Rsrv. v. Sweeney*, 932 F.3d 1207, 1219 (9th Cir. 2019)  
22 (administrative remedies not futile when agency has provided some responses  
23 and communicated with requester); *see also Aguirre*, 11 F.4th at 727–28 (same).

24 The Court, however, will continue to exercise jurisdiction over this case. In  
25 *Yagman*, the Ninth Circuit directed the district court to stay the case while the  
26 requester worked with the agency to reword the FOIA request. *See* 868 F.3d at  
27 1084. For this case to continue, Cavanagh may either exhaust administrative  
28 remedies for her first request, or she may refile her original requests—or

1 reformulated requests—with NNG. The Court will stay these proceedings until  
2 then. If NNG fails to respond within the statutory period, Cavanagh may ask this  
3 Court to remove the stay and continue forward in the case.

4 **IV. Conclusion**

5 Accordingly, the Court DENIES Defendant’s motion to dismiss.

6 The Court instructs the Clerk to STAY the case pending Plaintiff’s  
7 exhaustion of administrative remedies.

8 The Court orders the parties to meet and confer within thirty days of this  
9 order to discuss whether NNG will permit Cavanagh to appeal its earlier  
10 decisions. Otherwise, Cavanagh may refile a request while the case is stayed.

11 The parties must file a status report within 45 days of this order to inform  
12 the Court of whether Cavanagh is appealing the original responses or refiling her  
13 requests.

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15 DATED THIS 21st day of August, 2025.

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17 ANNE R. TRAUM  
18 UNITED STATES DISTRICT JUDGE  
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